No. 99-1577

In the Supreme Court of the United States

GREENBRIER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Acting Assistant Attorney General

DAVID M. COHEN
BRIAN M. SIMKIN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the enactment of legislation conditioning the prepayment of loans insured by the Department of Housing and Urban Development (HUD) upon HUD approval effected a taking of private property without compensation in violation of the Fifth Amendment to the United States Constitution.

2. Whether a claim that the legislation as applied to petitioners effected a taking is ripe.

3. Whether that legislation breached a contract between petitioners and the United States.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 193 F.3d 1348. The opinion of the Court of Federal Claims (Pet. App. 30a-65a) is reported at 40 Fed. Cl. 689.

JURISDICTION

The judgment of the court of appeals (Pet. App. 27a-29a) was entered on October 4, 1999. A petition for rehearing was denied on December 27, 1999 (Pet. App. 66a-68a). The petition for a writ of certiorari was filed on March 27, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the 1960s and 1970s, petitioners entered into separate agreements with HUD and private lenders for the purpose of financing the construction of low and

moderate income housing projects. Pet. App. 4a. Each transaction involved a similar set of agreements. First, petitioners and a private lender applied for and received from HUD a commitment to provide mortgage insurance subject to various conditions. *Id.* at 5a-6a. Second, after receiving commitments for insurance, the lender and developer executed 40-year mortgage notes and mortgages on the properties. *Id.* at 6a. Third, the developer signed a separate "regulatory agreement" with HUD, under which the developer agreed to make timely payments on the mortgage note and to observe low-income affordability restrictions. *Id.* at 7a. Fourth, in consideration of the developer's promises under the regulatory agreement, HUD endorsed the mortgage note, which effectively created a contract of mortgage insurance between HUD and the lender. *Ibid.*

HUD's mortgage insurance and a developer's regulatory agreement were to remain in effect for the duration of the loan. Pet. App. 7a. Prepayment of a loan would therefore terminate both the insurance and the regulatory agreement, allowing the developer to operate its project without regard to HUD's affordability restrictions. The regulatory agreement between HUD and the developer did not address prepayment of the loan or incorporate any other agreement on that issue. *Ibid.* The only document that addressed prepayment was the mortgage note. *Id.* at 6a. In most instances, the note provided that the loan could not be prepaid without HUD approval for the first 20 years of its term, but could be prepaid without approval after that time. *Ibid.*

In the late 1980s, Congress became concerned that owners of many housing projects might soon choose to prepay HUD-insured loans, potentially resulting in a shortage of low-income rental housing. Pet. App. 8a. In

1988, Congress responded by enacting the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA), Pub. L. No. 100-242, Tit. II, 101 Stat. 1877 (12 U.S.C. 1715*l* note). ELIHPA required developers to obtain approval from HUD before prepaying HUD insured loans. § 221, 101 Stat. 1878-1879. In order to approve a prepayment plan, HUD was required to find that (1) prepayment would not materially increase economic hardship for current tenants and (2) the supply of vacant, comparable housing would be sufficient to serve the community. § 225, 101 Stat. 1880. As an inducement to the owners not to prepay their notes, ELIHPA also authorized HUD to provide financial incentives to owners that agreed to remain in the low-income housing program voluntarily. 101 Stat. 1880-1881. See also Pet. App. 8a.

In 1990, Congress replaced ELIHPA with the Low-Income Housing Preservation and Resident Homeownership Act (LIHPRHA), 12 U.S.C. 4101 *et seq.* LIHPRHA also required owners to secure HUD approval before prepaying their loans. In order to approve prepayment, HUD was required to make findings similar to the findings required under ELIHPA. See 12 U.S.C. 4108(a), 4112(a).

In 1996, dissatisfied with the costs of LIHPRHA, Congress enacted the Housing Opportunity Program Extension Act of 1996 (HOPE), Pub. L. No. 104-120, § 2, 110 Stat. 834. HOPE authorizes owners to prepay their loans without HUD's prior approval, provided they do not raise rents for 60 days following prepayment.

2. After the enactment of HOPE, petitioners filed suit against the United States in the Court of Federal Claims. Pet. App. 9a. Petitioners alleged that ELIHPA and LIHPRHA effected an uncompensated

taking of private property under the Fifth Amendment. *Id.* at 10a. Petitioners also alleged that the prepayment restrictions imposed by ELIHPA and LIHPRHA breached a contractual commitment by HUD permitting petitioners to prepay their loans at any time after 20 years. *Ibid.*

The Court of Federal Claims granted summary judgment in the government's favor on both claims. Pet. App. 30a-65a. The court rejected petitioners' taking claim on the ground that it was not ripe for review because petitioners never applied to HUD for permission to prepay their loans and never received a final decision from HUD that they could not prepay them. *Id.* at 59a-64a. The court rejected petitioners' breach of contract claim on the ground that HUD was not a party to the agreement that gave petitioners a right to prepay their loans after 20 years. *Id.* at 46a-56a.

3. The court of appeals affirmed. Pet. App. 1a-26a. The court held that the enactment of ELIHPA and LIHPRHA did not effect a taking of petitioners' property. *Id.* at 18a-20a. The court noted that, under *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), a statute "that provides for a government entity to make a discretionary decision as to the conditions of use of property cannot be found to have taken property upon enactment." Pet. App. 18a. Since ELIHPA and LIHPRHA provide that owners may prepay their loans as long as they obtain HUD approval, the court concluded, "[t]heir enactment cannot * * * constitute a taking of any property." *Id.* at 20a.

The court further held that petitioners' claim that the statutes, as applied, took their property, is not ripe. Pet. App. 21a-23a. The court observed that, under this Court's decisions, an as applied takings claim is not ripe unless the government makes a final decision con-

cerning the property at issue. *Id.* at 21a. In this case, the court explained, petitioners did not follow the procedures for obtaining permission from HUD to prepay their loans, much less receive final decisions from HUD denying them such permission. *Id.* at 22a.

Finally, the court rejected petitioners' breach of contract claim on the authority of its earlier decision in *Cienega Gardens* v. *United States*, 162 F.3d 1123 (Fed. Cir. 1998), cert. denied, 120 S. Ct. 62 (1999), a case involving substantially-identical mortgage insurance transactions. Pet. App. 11a-13a. In *Cienega*, the court of appeals first noted that the Tucker Act, 28 U.S.C. 1491(a)(1), waives sovereign immunity with respect to contract claims only when there is "privity of contract between the plaintiff and the United States." 162 F.3d at 1129-1130. Assessing the transactions at issue, the court in *Cienega* concluded that the United States and the owners were not in privity of contract with respect to prepayment terms because (1) the regulatory agreements between the owners and HUD contained no provisions relating to prepayment and did not incorporate any such provisions by reference, and (2) HUD was not a party to the agreement between the lender and the owners that contained prepayment terms. *Id.* at 1132-1133.

ARGUMENT

1. Petitioners contend (Pet. 14-18) that the court of appeals erred in its assessment of their taking claim. That contention is without merit and does not warrant review.

The court of appeals' rejection of petitioners' taking claim rests on two grounds. First, the court held that the mere enactment of ELIHPA and LIHPRHA could not effect a taking of petitioners' asserted right to pre-

pay their loans, since both statutes provided that owners could prepay their loans as long as they obtained HUD approval. Pet. App. 18a-20a. Second, the court held that petitioners' as applied challenge is not ripe since petitioners neither sought permission from HUD to prepay their loans nor received a final decision from HUD denying them permission. *Id.* at 21a-23a. Each of those holdings is correct.

a. Petitioners' contention that the mere enactment of ELIHPA and LIHPRHA effected a taking was correctly rejected by the court of appeals based on this Court's decision in *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). In that case, the Court held that a requirement that a landowner must obtain a permit before using property in a particular way does not take property within the meaning of the Fifth Amendment. *Id.* at 126. The Court specifically explained that "the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking." *Ibid.* The Court elaborated on its reasoning as follows:

> A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself "take" the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent "economically viable" use of the land in question can it be said that a taking has occurred.

Id. at 127.

As the court of appeals concluded, since ELIHPA and LIHPRHA did not prohibit petitioners from prepaying their loans, but merely required that they obtain HUD approval before prepaying their loans, *Riverside Bayview Homes* forecloses petitioners' contention that the enactment of those statutes effected a taking of petitioners' property. Like a requirement that a person obtain a permit, a requirement that a person obtain HUD approval for a prepayment plan, "does not itself 'take' the property in any sense." 474 U.S. at 127. The very existence of a prepayment approval process "implies that permission may be granted, leaving [petitioners] free to [prepay] as desired." *Ibid.* Only when approval to prepay "is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred." *Ibid.* The court of appeals therefore correctly rejected petitioners' broad contention that the very existence of a prepayment approval requirement effected a taking of their property.

b. The court of appeals also correctly refused to entertain petitioners' as applied takings claim. This Court has held that, in order to make an as-applied takings challenge, a party must first obtain a final decision from the relevant government agency concerning how a statute will be applied to the property in question. *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). Such a final decision is necessary, because "among the factors of particular significance in the [takings] inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations," and those "factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position

regarding how it will apply the regulations at issue to the particular land in question." *Id.* at 191.

As the court of appeals in this case noted (Pet. App. 22a), petitioners did not seek permission from HUD to prepay their loans, much less obtain from HUD a final decision on such a request. There is therefore no basis for evaluating the economic impact of ELIHPA and LIHPRHA on petitioners or the extent to which it interfered with their investment-backed expectations. In these circumstances, the court of appeals correctly refused to entertain petitioners' as applied challenge.

c. Petitioners contend (Pet. 15-18) that the decision below conflicts with *Suitum* v. *Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), and *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998). There is, however, no conflict.

In *Suitum*, a landowner challenged as a taking a state agency's determination that her property was ineligible for development. 520 U.S. at 728. The Court held that the landowner's taking claim was ripe, because the agency had made a final decision that the property in question was ineligible for development, and the agency had no discretion to exercise over the property. *Id.* at 739. The situation here is entirely different. The statutes in question gave HUD discretion to permit petitioners to prepay their loans, and petitioners neither sought nor received a final decision from HUD on that issue. *Suitum* is therefore inapposite here.

Petitioners' reliance on *Eastern Enterprises* is similarly misplaced. In that case, the Court held that a statute that made certain employers responsible for funding health care benefits for retirees from the coal industry was unconstitutional as applied to Eastern. The Court reasoned that the legislation imposed severe

retroactive liability on Eastern and that the liability was unrelated to any commitment made by Eastern or any injury it had caused. 524 U.S. at 537 (plurality opinion); *id.* at 549-550 (Kennedy, J., concurring in the judgment and dissenting in part). With respect to the impact of the legislation on Eastern, "there is no doubt" that the statute in question "forced a considerable financial burden upon Eastern," with estimates ranging from $50 to $100 million. *Id.* at 529 (plurality opinion).

In contrast to the statute at issue in *Eastern Enterprises*, ELIHPA and LIHPRHA did not impose any liability on petitioners. Instead, as noted above, it simply required petitioners to obtain approval from HUD before prepaying their loans. Moreover, because petitioners neither sought permission to prepay nor received a decision denying them permission to do so, there is no basis for a finding that ELIHPA and LIHPRHA had any economic effect on petitioners, much less the kind of substantial, unexpected, and disproportionate effect that triggered constitutional concern in *Eastern Enterprises*. Petitioners' contention that the decision below conflicts with *Eastern Enterprises* is therefore incorrect.

2. Petitioners contend (Pet. 18-28) that the court below erred in rejecting their breach of contract claim. This Court recently denied certiorari on a nearly identical claim, *Sherman Park Apartments* v. *United States*, 120 S. Ct. 62 (1999), and there is no reason for a different outcome here.

a. Petitioners argue (Pet. 18-28) that they secured a contractual right from HUD that they could prepay their loans without HUD approval after 20 years. As the court of appeals held, however, a plaintiff may assert a contract claim against the United States only when there is privity of contract between the plaintiff

and the United States. Pet. App. 11a. And, in this case, there was no privity of contract between the United States and petitioners concerning prepayment terms. In particular, the regulatory agreements between petitioners and HUD contained no provision relating to prepayment and did not incorporate any such provisions by reference, and HUD was not a party to the agreement between the lenders and petitioners giving petitioners a right to prepay their loans after 20 years without HUD approval. *Id.* at 12a-13a. The court of appeals therefore correctly rejected petitioners' breach of contract claim.

b. Petitioners err in contending (Pet. 20-22) that the decision below conflicts with this Court's decision in *United States* v. *Winstar Corporation*, 518 U.S. 839 (1996). In *Winstar*, financial institutions alleged that they had contracts with the United States allowing the use of supervisory goodwill to satisfy a portion of their regulatory capital requirements. Although the contracts did not expressly address the issue, they contained integration clauses that expressly incorporated contemporaneous documents, and the Court concluded that the incorporated documents allowed the financial institutions to use supervisory goodwill to satisfy capital requirements. See 518 U.S. at 860-868.

The situation here is entirely different. Here, while petitioners allege that they had contracts with HUD allowing them to prepay their loans after 20 years without HUD approval, the contracts between petitioners and HUD do not address prepayment and do not incorporate any documents addressing prepayment. There

is therefore no conflict between the decision in *Winstar* and the decision below.[1]

Petitioners contend (Pet. 21) that the absence of an integration clause incorporating prepayment terms is not fatal to their claim. The critical point, however, is that petitioners are unable to cite any language in their agreements with HUD that could serve as a basis for a conclusion that those contracts contain terms relating to prepayment. Moreover, the absence of an integration clause incorporating prepayment terms is especially significant in the present context because other documents involved in the transactions contain express language of incorporation. See C.A. App. 151 ("Note and all its terms are incorporated herein by reference."); C.A. App. 1148 ("This Note is secured by a mortgage of even date * * * and all the provisions of said instrument are incorporated herein and are to be deemed a part hereof as fully as though herein set out."); C.A. App. 229 ("The provisions of the rider hereto attached are incorporated in and made a part of this Note."). The absence of any comparable clause incorporating prepayment terms is telling evidence that

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[1] To support their contract claim, petitioners also rely (Pet. 23-24) on remarks of former HUD officials and members of Congress, and the declaration of Lawrence R. Burk. Those statements, however, were made 20 to 30 years after the transactions at issue in this case, and there is nothing to suggest that those individuals were familiar with the agreements at issue here. More fundamentally, the question whether HUD entered into agreements regarding prepayment terms ultimately turns on the language of the agreements, and the materials petitioners cite are no substitute for contract language they failed to secure. See *Cienega*, 162 F.3d at 1134 ("The after-the-fact views of various parties cannot create a contractual relationship between HUD and [petitioners] with respect to prepayment terms, where the contractual documents themselves fail to evidence such a relationship.").

HUD did not contractually bind itself to particular prepayment terms.[2]

c. Also without merit is petitioners' claim (Pet. 25) that the government's position in this case conflicts with its position in *United States* v. *David*, No. 94-7191, 1998 WL 351693 (E.D. Pa. June 30, 1998). *David* involved the "section 244" coinsurance program of the National Housing Act, 12 U.S.C. 1715z-9. Pursuant to that program, the *same parties* entered into a regulatory agreement, mortgage, and note. In those circumstances, the government argued that the agreements should be interpreted as a coherent whole. See Pet. 26. There is no inconsistency between that unexceptional argument and the government's argument in this case that HUD did not commit itself to certain prepayment terms when its contracts with petitioners do not address prepayment or incorporate other documents that address prepayment, and when HUD is not a party to the prepayment agreements between petitioners and their lenders.

d. Finally, petitioners argue (Pet. 28) that, by "adopting" the "regulations *then in effect* into [HUD's]

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[2] Petitioners also argue (Pet. 21-22) that this Court would have reached the same result in *Winstar* even absent the integration clauses, based upon "the overall facts and circumstances" of those transactions. In *Winstar*, however, this Court only stated that, to the extent the integration clauses were ambiguous, the "realities" of the transaction "favored" reading those documents as contractual commitments. 518 U.S. at 863. In any event, the "realities" surrounding the programs in this case do not support the conclusion that the parties regarded prepayment provisions as binding contractual commitments. Unlike the thrifts in *Winstar*, petitioners would not have been subject to regulatory noncompliance, penalties, or financial distress in the absence of a contractual commitment permitting prepayment of their mortgage notes at some point prior to the note's maturity.

endorsement of the Note," HUD "relinquished its right to change the terms of the contract by amending those regulations," including those permitting prepayment. The regulations in effect at the time of HUD's endorsement, however, specifically provided that HUD's endorsement of the note marked a contract of mortgage insurance between HUD and the lender, under which HUD and the lender were "bound by the provisions of [24 C.F.R. Pt. 207, subpt. B] and the applicable sections of [the NHA]." See, *e.g.*, 24 C.F.R. 207.254(c) (1970). The referenced regulations therefore have no bearing on the contract between HUD and petitioners. Moreover, the prepayment regulations, *e.g.* 24 C.F.R. 221.524(a)(ii), 236.30(a) (1970), were not part of 24 C.F.R. Part 207, subpart B. The prepayment regulations therefore could not be viewed as part of any contract allegedly formed between the owners and HUD by the insurance endorsement. See *Lurline Gardens Ltd. Housing Partnership* v. *United States*, 37 Fed. Cl. 415, 420 n.7 (1997).

Even if we assume that the notes' reference to regulations embraced all regulations applicable to the relevant statutory programs, including the prepayment rules, that would not assist petitioners. If such an interpretation were adopted, it would also embrace the regulations in which HUD reserved the power to amend the prepayment rules, *e.g.* 24 C.F.R. 221.749, 236.249 (1970), and that reservation would have to be read into any contract along with the prepayment rules. *Cienega*, 162 F.3d at 1134. Analysis of the applicable regulations in effect at the time of the transactions therefore cuts against, rather than in favor of, petitioners' contractual argument.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DAVID W. OGDEN
Acting Assistant Attorney General

DAVID M. COHEN
BRIAN M. SIMKIN
Attorneys

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